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In the Supreme Court of the United States

OCTOBER TERM, 1989

MONROE SYSTEMS FOR BUSINESS, INC.,
Petitioner,

vs.

WALTER L. BROOKS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER MONROE SYSTEMS FOR BUSINESS, INC.'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO RESOLVE THE EXISTING, SPECIFIC CONFLICT AMONG THE COURTS OF APPEAL ON THE CRITICAL ISSUE OF WHETHER, IN AN ADEA CASE, DISCRIMINATORY INTENT IS PROVEN BY THE FACT THAT THE EMPLOYER'S REASON FOR THE ALLEGEDLY DISCRIMINATORY ACT IS DISCREDITED

Contrary to Brooks' argument, there is a specific, existing conflict among the courts of appeal regarding the issues presented by Monroe's petition for certiorari. Brooks' counterstatement of the question presented by

the petition dramatically illustrates the conflict. Brooks states that the question presented is:

> The Eighth Circuit's decision correctly applied the law and is in harmony with the decisions of other circuits which hold that an employee can prevail by means of indirect evidence that the employer's reason is unworthy of credence.

The Fourth, Fifth and Seventh Circuits have expressly held that employment discrimination is not proven simply because "the employer's reason is unworthy of credence." *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989); *Bienkowski v. American Airlines*, 851 F.2d 1503 (5th Cir. 1988); *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987).[1]

The conflict among the circuits results from the misapplication of the unqualified and, to date, unexplained language from cases such as *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1980), that the alleged discriminatee can satisfy his or her burden to show that an employer's legitimate, nondiscriminatory

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1. Brooks incorrectly suggests that the Seventh Circuit would sustain an employment discrimination claim simply because the employer's reason for the allegedly discriminatory action is unworthy of credence. (Brief, p. 12 n.4) Even after the Seventh Circuit's decisions in *McMillan v. Svetanoff*, 878 F.2d 186 (7th Cir. 1989), and *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989), upon which Brooks relies, the Seventh Circuit continues to emphasize that a " 'showing that the employer dissembled is not necessarily the same as showing "pretext for *discrimination*" ' ". *Brown v. M&M/Mars*, ... F.2d ....., 50 FEP 497, 502 (7th Cir. 1989) (quoting from *Pollard*, *supra*; emphasis in original). Even if Brooks were correct, to the extent that decisions within the Seventh Circuit are now confused and inconsistent on the issues raised by this petition, the grant of the petition becomes even more necessary as the law under the Age Discrimination in Employment Act would be less certain on the fundamental issues raised by the petition.

reason for its action is a pretext for discrimination by demonstrating that the employer's reason is "unworthy of credence." An employer's reason may be "unworthy of credence" because of myriads of factors which are wholly unrelated to any discriminatory intent. An employer's reason which is "unworthy of credence" does not itself compel or permit the inference that the true reason must have been discriminatory animus. *Holder, supra.* This Court has never held and should not permit lower courts to hold that the fact that an employer's reason for the alleged discriminatory action is "unworthy of credence" establishes discriminatory intent.

Misapplying the Court's "unworthy of credence" language, some courts of appeal, such as the Eighth and the Third Circuits as described in the petition, permit evidence and argument in ADEA cases that the employer's decision is "unworthy of credence", and, hence, discriminatory, even though the evidence and argument do not warrant a reasonable inference that the employer was motivated by age animus. Thus, in the decision below, the Eighth Circuit held that "submission by an employer of a discredited reason to discharge is itself evidence of discriminatory motive."[2] (A25) The Eighth Circuit's holding demonstrates that the "unworthy of credence" language in this Court's opinions is being misused to effectively rewrite the ADEA into a general wrongful discharge statute, violating the limited inten-

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2. Demonstrating the need for this Court's explanation of the "unworthy of credence" language, the Eighth Circuit deviated from its decision in this case that a discredited reason for action is tantamount to discriminatory animus and recently held that even an employer's decision which is based on "laughable" reasons is not tantamount to discriminatory animus. *Gray v. University of Arkansas*, ... F.2d ....., 1989 WL 97735 (8th Cir. 1989).

tion of Congress and inundating the federal courts with age discrimination claims which are, in fact, nothing more than attempts to second guess an employer's business judgment.

Are the issues which Monroe has raised in its petition matters of critical importance affecting the application of the ADEA and involving a conflict among the courts of appeal or, as Brooks suggests, are they only a matter of evidentiary argument? Under the decision in the court below, any employer planning a reduction-in-force in the Eighth Circuit which will involve the lay-off of an employee who is over 40 years old and the retention of any younger employee will conclude that the employee who is over age 40 cannot be laid-off without substantial unavoidable risk, although the ADEA does not prohibit the lay-off of an employee who is over 40. An employer reading the decision below in this case would necessarily fear that the lay-off of an employee who is over 40 while any younger employee is retained would be held to violate the ADEA in the event that a jury or court simply disbelieved the employer's reason for its decision, although the ADEA only prohibits decisions proven to be based upon age animus.

Employers make workforce decisions on a daily basis in an effort to compete and to remain viable sources of employment for their employees. The ADEA was never intended to regulate an employer's exercise of its judgment simply because someone may later conclude that the judgment, in the Eighth Circuit's term, should be "discredited". Thus, far from mere evidentiary debate, the petition raises issues involving the illegal extension of the ADEA to adversely affect the employer's freedom to run its business.

Employers in the Eighth Circuit are unable to exercise their right to manage their business under the ADEA because, under the Eighth Circuit's holding in this case, an employer's reason for a business decision which is "unworthy of credence" for reasons unrelated to age animus will be held to have violated the ADEA. Yet, in the Fourth, Fifth and Seventh Circuits, the employer would be protected from the misapplication of the ADEA by the *Holder, Bienkowski*[3] and *Pollard* decisions which correctly reject the argument that the ADEA is violated merely because of a conclusion that the employer's decision is "unworthy of credence" in some general sense. And, in the Eleventh Circuit, the employer would be protected by the holding in *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989), that the employee must present "substantially probative" evidence that the employer's reasons were a pretext for intentional age discrimination.

Respondent Brooks' argument to this Court is the best illustration of the significance of the issue raised by the petition and compels that this Court grant Monroe's petition for certiorari to preclude ADEA actions which rely upon an attack on the credence of the employer's

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3. *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404 (5th Cir. 1989), does not abandon the Fifth Circuit's holding in *Bienkowski* as Brooks suggests. (Brief, p. 10) In *Uffelman*, the Fifth Circuit discusses only evidence regarding the basis for the employer's decision to terminate—performance factors. The employer had a pattern of laying-off the oldest employees and its managers admitted that the claimant's performance was superior to retained younger employees' performance. In the present case, the determining factor was Brooks' junior seniority date and the only evidence regarding seniority dates was that Monroe computed Brooks' seniority date exactly as it had computed the seniority date of a similarly situated younger employee (see note 3, *infra*). Nothing in *Uffelman* suggests that the Fifth Circuit would accept the mere incredibility of the employer's reason for discharging an employee as evidence of age animus.

reason for action and provide no evidence regarding the existence of age animus. On page 9 of his brief, Brooks lists "additional evidence" (that is, evidence in addition to the alleged incredibility of Monroe's reasons for laying-off Brooks) which he claims permitted the Eighth Circuit to infer age discrimination. In fact, the "additional evidence" challenged Monroe's decision on a variety of factors, but none of those factors reasonably permits an inference of age discrimination.

Brooks alleges "additional evidence" consisting of the fact that he had requested to go to copier school on several occasions. (Brief, p. 9) Brooks DOES NOT cite any evidence to this Court that any younger person asked to go to copier school when Brooks had asked or that Monroe sent any younger person to copier school at that time. Brooks DOES NOT cite this Court to any evidence that the refusal to send him to copier school was due to his age. For example, Byron Taylor, who was the only employee other than Brooks who was not trained or working with copiers, had an earlier seniority date than Brooks, was younger than Brooks and was not sent to copier school. Moreover, in fact, Monroe sent Brooks to computer school.

Brooks alleges "additional evidence" that he had substantial in-shop copy repair experience. (Brief, p. 9) Brooks DOES NOT cite this Court to any evidence that in-shop copier repair experience was relevant to Monroe's decision. Brooks' experience was taking some copiers out of a shipping box. (2Tr. p.36, l.24-p.38, l.6) Each employee (other than B. Taylor and Brooks) was performing out-of-shop copier repair at the customers' places of business—those repairs which are most important to customers faced with a malfunctioning copy machine and which constitute nearly all of Monroe's copier repair business.

Brooks claims that there was "additional evidence" that he had "substantial knowledge" of the copier equipment. (Brief, p. 9) Brooks DOES NOT cite this Court to any evidence that the retained employees who were younger did not have substantial knowledge of the copier equipment. The evidence showed that all other employees (except B. Taylor and Brooks) were working on copiers in the field at the customers' places of business.

Brooks claims that he had "additional evidence" permitting an age discrimination verdict in that the repairman who Brooks describes as a "go-for" was sent to a copier school after Brooks was fired. Brooks DOES NOT cite this Court to any evidence that Brooks was qualified for the advanced copier school to which the other employee was sent. Unlike Brooks, the alleged "go-for" had uncontrovertedly previously performed months of copier repair for Monroe at its customers' places of business and had worked as a copier repairman prior to joining Monroe. Additionally, Brooks DOES NOT cite this Court to any evidence that Byron Taylor, who was retained by Monroe, who had an earlier seniority date than Brooks and who was younger than Brooks, was sent to any copier school.

Brooks claims that there was "additional evidence" of age discrimination in that he had received very high performance ratings prior to his discharge. Brooks DOES NOT cite this Court to any evidence that Monroe considered performance ratings in choosing who to lay-off. Brooks DOES NOT cite any evidence to this Court that the performance ratings of the younger employees were unsatisfactory in any regard.

Finally, Brooks claims that there was "additional evidence" to support a conclusion of age discrimination

in that there was inconsistent testimony by two management employees. Brooks DOES NOT cite this Court to any evidence that the alleged inconsistencies between the former manager's testimony regarding his discharge had anything to do with his age—even Brooks' own witness denied that Brooks' age was a factor in the decision to terminate him.[4]

Brooks DOES NOT cite any age related evidence is his attack on the credibility of Monroe's business judgment to choose him for lay-off where it would have had to train him to do the work and where all others were already doing the work. Brooks argues as follows:

> Petitioner expended great effort to make one believe that doing preventive maintenance on a copy machine was akin to brain surgery. It was not. Such work did not require extensive training or experience, and the jury understood that if the company was truly interested in doing only copier repair work that respondent with a two or three day training ses-

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4. Monroe's choice as to who to lay off was between two people who had no meaningful copier repair experience (Brooks and B. Taylor). Monroe chose Brooks because his seniority date was junior to B. Taylor's seniority date. Brooks' attorneys' complete fabrication to this Court that he did not know his seniority date until his discharge (Compare Brief, p.2 to 1Tr. p.54, ls.23-25; p.61, l.17-p.62, l.5; 2Tr. p.116, l.24-p.117, l.18) is irrelevant. Brooks DOES NOT cite any evidence to this Court that any similarly situated employee was treated differently than he was regarding the computation of his seniority date. The only evidence showed that an employee who was much younger than Brooks was treated exactly as Brooks was treated regarding the computation of his seniority date after a break-in-service. (1Tr. p.155, ls.9-14; J.A., p.133, Amend. DX61) Brooks cites *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989), but in *Smith* the Seventh Circuit rejected the very argument about the use of seniority dates which Brooks makes to this Court, even assuming that Brooks' citation to the record were accurate.

> sion could perform that work and still do work on the "computer" aspect of the business machines sold by Petitioner. (Brief, pp. 15-16)

Brooks' suggestion that he could have been trained is not evidence of age discrimination. Every employee except Brooks and Byron Taylor were already doing copier work. Brooks' argument that any training which he needed was not extensive does not prove age discrimination. The ADEA does not obligate an employer to train an older employee in order to retain him where younger employees are already doing the work. *Branson v. Price River Coal Co.*, 853 F.2d 768 (10th Cir. 1987).

Thus, what Brooks DOES NOT tell this Court and could not tell the jury was that any of the factors upon which he relied to question the credibility of Monroe's decision to lay-off Brooks tended to prove age animus. Brooks' claim would not have even been submitted to the jury or affirmed on appeal if it had been presented in the Fifth, Fourth or Seventh Circuits where, contrary to the holdings of the Eighth and Third Circuits, the mere discrediting of an employer's decision does not amount to evidence of discriminatory animus.[5] Similarly, Brooks' claim would not have been submitted to the jury or affirmed on appeal in the Eleventh Circuit because there was no "significantly probative evidence that the proffered reason is a pretext for discrimination." *Carter, supra.*

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5. Contrary to Brooks' argument (Brief, p. 13), Monroe is not suggesting that only direct evidence of age animus can prove an age discrimination case. Monroe recognizes that circumstantial evidence may be probative of age discrimination but the circumstantial evidence must relate to age animus and not, as here, solely to the general believability of the employer's decision.

II. CONCLUSION

This Court should grant the petition for certiorari to resolve the conflict among the courts of appeal on the critical issue as to whether a "discredited" reason for the alleged discriminatory act necessarily proves discriminatory intent in an ADEA case.

Respectfully submitted,

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